A failure to reply to a note in a bill to the effect that if the amount was disputed the plaintiff should be notified does not amount to an admission.

FEDERAL COURT.

*H. N. McLeod* (*John Ang Soon Ho* with him) for the appellant.

*M. S. Miranda* for the respondent.

The oral judgment of the court was delivered by —

**Azmi C.J. (Malaya):** A judgment was entered into in this case on the basis that this was an account stated. On examination of the pleadings and averments in the affidavits, we find no justification for this conclusion.

One of the essential ingredients of an account stated is an admission by the defendant that he owed the money. It was contended before us that a failure to reply to a note in the bill sent, to the effect that if the amount was disputed, the plaintiff should be notified, amounted to an admission. We do not agree with this.

In the circumstances of this case we do not consider the account in this case as an account stated. The appeal is allowed with costs. The judgment is set aside and the case remitted for hearing.

*Case remitted for hearing.*

Solicitors: *Sault, Keith Seller & Co.; M. S. Miranda.*

---

## GAN KOK LIONG v. PUBLIC PROSECUTOR

**[A.Cr.J. (Raja Azlan Shah J.) October 9, 1968]**
**[Raub — Criminal Appeal No. 2 of 1968]**

*Criminal Law and Procedure — Prevention of crimes — Restricted residence — Order for — Whether 2nd order can be made after expiry of 1st order — Conclusiveness of Minister's order — Prevention of Crimes Ordinance, 1959, s. 15(2)(f) and (4).*

*Criminal Law and Procedure — Trial — Cross-examination of accused and his witnesses — Whether frequency and nature of interruption by president amount to irregularity.*

The appellant was convicted by the sessions court on a charge under section 15(2)(f) of the Prevention of Crimes Ordinance and was sentenced to 2 years imprisonment. He appealed on two grounds: (a) that the second order of restricted residence made by the Minister of Interior was invalid as it was made after and not during the currency of the first order and (b) that the learned president of the sessions court had subjected the appellant to severe cross-examination thus preventing a fair trial.

**Held,** dismissing the appeal: (1) the Minister was perfectly entitled to make the second order that was made and it was conclusive and not assailable by the courts;

(2) looking at the case as a whole the trial was not conducted in an irregular manner by reason of the frequency and nature of the interruptions by the president of the sessions court. There was therefore no reason to interfere with his findings.

*Cases referred to:—*

(1) *R.* v. *Gilson & Cohen* (1944), 29 Cr. App. R. 174 p. 181.

(2) *R.* v. *Cain* (1936), Cr. App. R. 204 at p. 205.

(3) *R.* v. *Bateman* (1946), 31 Cr. App. R. 106 at p. 112.

(4) See *Clewer* (1953), 37 Cr. App. R. 37.

CRIMINAL APPEAL.

*Tara Singh Sidhu* for the appellant.

*Yusof bin Ahmad* (Deputy Public Prosecutor) for the respondent.

*Cur. Adv. Vult.*

**Raja Azlan Shah J.:** The appellant was convicted by the president, sessions court, Raub, on a charge under section 15(2)(f) and punishable under section 15(4) of the Prevention of Crimes Ordinance, 1959, and was sentenced to two years' imprisonment.

The facts do not appear to the court to have presented any features of difficulty. On 29th January 1962 the Menteri Dalam Negri* made an order placing the appellant under restricted residence within the limits of the Mukim of Batang Melaka, Jasin District, Melaka, for a period of two years and subjected him to certain specified conditions, one of which was to remain indoors in the house or place in which he was to reside between the hours of 8 p.m. and 6 a.m. This order lapsed two years later, and on 26th November 1965 the Menteri Dalam Negri made a fresh order placing the appellant under restricted residence for a period of 3 years and subjected him to certain specified conditions, namely, that he was required to reside within the limits of the Mukim of Kuala Sungei Bahru in the District of Alor Gajah, Melaka, and to remain indoors in the house or place in which he was to reside within the hours of 10 p.m. and 6 a.m. On 13th May 1966, that is, during the currency of that order, the Menteri Dalam Negri varied the condition with regard to residence, namely, that he was required to reside in the Mukim of Raub in the administrative district of Raub, Pahang.

The appellant was duly removed to Raub and he informed the O.C.P.D. Raub that he intended to stay in a rented room on the first floor of house No. 8, Jalan Lipis, Sempalit, and he has resided there ever since. The police regularly checked on him at his residence to see whether he was observing the conditions enforced against him. That was done by the police who went on rounds, calling out his name, whereupon he appeared and answered to their call. On 16th

* Minister of the Interior.

February 1968 at about 1.00 a.m. police constable Jaafar bin Hassan (P.W.7), detective police constable John Matthew Ng (P.W.8) and detective corporal Din bin Ishak went on their rounds. They eventually came to the appellant's residence and as usual called out to him by name. They received no reply. They then went to check his room but found that he was not in. They checked the bathroom but he was not there either. P.W.7 remained at the front door of the appellant's house while the other two police officers went to the police post and reported the matter to Inspector Tajuddin who instructed them to lay an ambush. In the meantime, P.W.7 saw a motor-cycle coming out of the New Village. When it came near him he identified the rider as Chew Man Chye (D.W.3) and the pillion rider as the appellant. The police constable asked them to stop but they ignored him and went straight to the rear of the building. The police constable gave chase and saw the appellant climbing the pipe line into his room. The police constable then rushed upstairs and found the appellant in the act of removing his shoes. He then arrested him.

The appellant denied that he went out after 10.30 p.m. on 15th February 1968. He called his room mate, Leong Soh Ha (D.W.2) as a witness who gave the same story as the appellant, but the learned president found that the story was too consistent to be true. The appellant also called Chew Man Chye as his third witness. He denied carrying the appellant on his motor-cycle that night. He testified that on 15th February 1968 he went to Mentakab on a motor-cycle with his friend Chew Seng Kwan (D.W.4) as the pillion rider. He said that they left Mentakab at about 8.30 p.m. and arrived at Raub at about 1.30 a.m., travelling at about 20 m.p.h. for that 70 odd miles. His evidence was not accepted. Although it can be said that the learned president considered the evidence of each of the defence witnesses minutely he came to the general impression that their evidence was unreliable and concluded that the defence had "failed to raise a reasonable doubt of the prosecution's case which warranted the court to give the benefit of such doubt to the accused and thereby acquit and discharge him."

There are two grounds of appeal. First, it is said that the second order made by the Menteri Dalam Negri on 26th November 1965 is invalid, illegal, and of no effect as it was made after the expiry of the first order dated 29th January 1962. It is argued that the second order should have been made during the currency of the first order.

I am not here to question the Menteri Dalam Negri's order. For present purposes it is conclusive and not assailable. In any event that is not the complaint advanced by the appellant in this court. Section 15(1) of the Prevention of Crimes Ordinance enacts that:—

> "The Minister may by order direct that any registered person . . . . shall be subject to the supervision of the police for a period not exceeding five years, and may *renew any such order** for a further period or periods not exceeding five years at a time. . . ."

In my view, the first order was made with certain conditions to the effect that the appellant was restricted to the Mukim of Batang Melaka, Jasin District. There was no renewal of that order for any period of time. That order expired. Ten months later the Minister made a second order with restrictions among which the appellant was required to reside within the limits of another area, the Mukim of Kuala Sungei Bahru in the District of Alor Gajah. During the currency of that order the Minister, as allowed under sub-section (3), varied the restriction to the effect that the appellant was required to reside within the limits of the Mukim of Raub. In my opinion the Minister was perfectly entitled to do that. Ground one therefore cannot be supported.

I now come to ground two where it is said that the learned president had descended into the arena, thus clouding his vision with the dust of the conflict. It is based on the premise that the learned president had subjected the appellant and his witnesses to severe cross-examination and thus disenabled the appellant from presenting a fair defence. It is on record that the learned president cross-examined the appellant and his two witnesses at some length after their re-examination. It is also on record that the learned president adjourned the court to Mentakab where he asked D.W.3 to indicate to him the rubber plantation, the shop where he had had his meal, and the shop belonging to his friend's uncle. (This was the evidence adduced by him in his examination-in-chief). It is further stressed that had the learned president not pursued this course he would have found that the appellant had raised a reasonable doubt in the prosecution case.

I am of the view that the guiding line which any magistrate or president should have adopted in such circumstances is the observations which were made in *R.* v. *Gilson and Cohen* [1] at p. 181 in which the Court of Criminal Appeal adopted the language of an earlier decision, *R.* v. *Cain* [2] at p. 205, and which had been re-adopted and applied to the case of any witnesses whether called by the prosecution or by the defence. (See *R.* v. *Bateman* [3] at p. 112). The observations were in the following terms:—

> "There is no reason why the judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable in this case that, beginning in the way which I have described, the judge should proceed, without giving much opportunity

* The emphasis is mine.

to counsel for the defence to interpose, and long before the time had arrived for cross-examination, to cross-examine Chatt with some severity. The court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner."

Although it is quite right that this criticism should have been made, it cannot be doubted that the result of the present case would have been otherwise if this course had not been taken by the learned president.

Looking at the case as a whole, it is not possible to impute that the trial in the form which it took was conducted in an irregular manner by reason of the frequency and nature of interruptions by the learned president which rendered it impossible for the defence to be fairly presented. (See *Clewer* [4]). Neither can it be said that the learned president took the examination out of the hands of counsel. He interposed (indeed after all the cross-examinations and re-examinations by both counsel) in order to enable him to acquire indicative evidence. If the object of a trial is first to ascertain truth and then do justice — justice according to law — upon the basis of this truth, then the learned president is not only justified but required to elicit any facts he deems important wherever these interests of truth and justice would suffer if he fails to do that.

In these circumstances I see no reason to interfere with the conviction, certainly not on any ground submitted in argument before this court. The appeal is dismissed.

*Appeal dismissed.*

Solicitors: *Sault, Keith Sellar & Co.*

---

## YEW PHAIK HOON v. QUAH OOI KEAT & ANOR.

**[P.C. (Lord Morris of Borth-Y-Gest, Lord Pearce & Lord Wilberforce) October 14, 1968]**

**[Privy Council Appeal No. 5 of 1967]**

*Practice and Procedure — Appeal — Question of fact — No sufficient reason to interfere with findings of trial judge.*

*Trusts and Trustees — Resulting trust — Advancement — Whether land transferred as gift or subject to trust.*

This was an appeal from the decision of the Federal Court (reported in [1966] 2 M.L.J. 208) which had reversed the decision of the trial judge. The facts are as follows:

The plaintiff, the second wife of *Q.H.C.*, claimed a declaration that the first defendant, her stepson, and the second defendant, her own son, who were the registered proprietors of three pieces of land in Johore forming an oil palm estate, were not the beneficial owners but held the oil palm lands as trustees for her.

*Q.H.C.* became bankrupt in 1932. After his bankruptcy *Q.H.C.'s* business was carried on by the plaintiff's brother *Y.H.E.*, who was also administrator of the estate of the plaintiff's deceased father. On December 27, 1937, *Q.H.C.* transferred the oil palm lands to the Official Assignee and on January 13, 1938, the official assignee transferred the land to *Y.H.E.* On October 1, 1933, *Q.H.C.'s* discharge in bankruptcy became effective. On June 29, 1940, an agreement was signed between the plaintiff and *Y.H.E.* which recorded that it was thereby agreed: (1) all businesses of *Y.H.E.* in Kluang and Singapore, the purchases of properties, etc. in the said places were all undertaken on the plaintiff's behalf, (2) all these were then vested and returned to the plaintiff in a satisfactory manner.

*Y.H.E.* died on November 17, 1944, but had on November 11, 1940, executed a transfer of the lands in favour of the defendants. It was admitted that the consideration stated in the transfer was not paid. The documents of title were kept in the office of the Johore Lumbering Co. Ltd.

The Johore Lumbering Co. Ltd. (incorporated in May 1941) was a family company in which all members of the family had shares. All payments in respect of the development of the oil palm lands were made by the company and all income from the oil palms was received by the company. The actual management was in the hands of the two defendants but they drew remuneration from the company. Income tax in respect of the oil palm estate revenue was paid by the company although it was declared to the Inland Revenue as the income of the defendants. The plaintiff claimed that she had given her brother the money to buy the oil palm lands and that the defendants had been appointed only to look after the lands. Azmi J., as he then was, held that *Y.H.E.* had held the estate as trustee for the plaintiff and that *Y.H.E.* had transferred it to the defendants as trustees for the plaintiff.

The defendants appealed against this decision. In the Federal Court it was held (Thomson L.P. dissenting) that the plaintiff had failed to prove that the estate was in fact held by *Y.H.E.* in trust for her and no other and that the transfer to the defendants was at her request and they allowed the appeal. The plaintiff appealed to the Privy Council.

**Held,** allowing the appeal: (1) the learned trial judge had found as a fact that the estate was held by *Y.H.E.* in trust for the plaintiff and this finding could not be disturbed unless (which was not the case) supporting evidence was lacking or if some factual misapprehension of evidence is shown;

(2) the learned trial judge in this case had rejected the claim of the defendants that the lands were transferred to them by way of gift and therefore the plaintiff must succeed in this case, even though she had failed to show that the lands were transferred by *Y.H.E.* at her request.

PRIVY COUNCIL.

*E. F. N. Gratiaen* Q.C. and *Ian C. Bailleu* for the appellant.

*T. G. Le Quesne* Q.C. and *Mervyn Heald* for the respondent.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by —

**Lord Wilberforce:** This appeal relates to a land dispute between members of a large Chinese family in Malaysia. The land consists of approximately 1,000 acres, included in grants made by